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Chairman: Mrs. FLORES (Uruguay)

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AGENDA ITEM 143: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-FIFTH SESSION (continued)

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The meeting was called to order at 3.20 p.m.

AGENDA ITEM 143: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-FIFTH SESSION (continued) (A/48/10, A/48/303 and A/48/170-S/25801)

1. Mr. YOUSIF (Sudan) said that his delegation would confine itself to comments on chapters IV and V of the report of the International Law Commission (ILC) (A/48/10), which dealt with State responsibility and the law of the non-navigational uses of international watercourses, respectively. With regard to State responsibility, his delegation considered that article 1 (2) should be redrafted in order to accommodate all cases. The Commission should also review the wording of articles 2 and 4 and decide whether it was legally appropriate to determine the consequences of an internationally wrongful act pursuant to the provisions of the draft articles on State responsibility but otherwise apply the provisions of the Charter of the United Nations.

2. In article 5, the expression "injured State" should be replaced by "claimant State", since a State could be described as injured only if an independent judicial mechanism so decided. In article 5 (2), the Commission might also wish to list infringement of the rights in rem acquired by prescription. Article (2) (b) and (c) should be confined to rights arising from judicial decrees or arbitration awards. Subjecting a State to other proceedings might constitute double jeopardy. The right to commence proceedings should be restricted to the State claiming a particular injury, and the Commission should delete the second part of paragraph 2 (c).
Paragraph 2 (e) (iii) should also be deleted, since it gave any State the right to sponsor claims dealing with human rights and fundamental freedoms. Moreover, it was not clear how a particular State could suffer injuries from another State by reason of the latter's violation of the rights established for human rights and fundamental freedoms. The same comment also applied to article 5 (2) (f).

3. In article 6 bis, entitled "Reparation", paragraph 2 (b) should be redrafted to clarify that the "national" belonged to the claimant State and not the respondent State. In the current text, the claimant State could institute proceedings on behalf of any citizen of the respondent State, which would adversely affect the sovereignty of the latter. His delegation noted that no consensus had been reached on paragraph 3 of article 6 bis, and associated itself with the view that claims for reparation could be rejected if they conflicted with the constitutional law of Contracting States. There was a need to formulate a new paragraph providing for exhaustion of all domestic recourses before an action could be brought before an international organ.

4. In article 8, entitled "Compensation", paragraph 2 should be deleted, since interest and loss of profits were not permissible under Islamic law. Moreover, the criteria existing in the respondent State before the entry into force of the international instrument should also be used in determining the compensation due to States injured by acts committed prior to that date.

5. In article 10, entitled "Satisfaction", it might be useful to delete subparagraphs (c) and (d), which could give rise to interference in the internal affairs of States and could be misused to exert leverage on developing countries that did not possess the financial capabilities to defend themselves in

(Mr. Yousif, Sudan)

international proceedings. Article 10 bis, under which the injured State was entitled to ask the wrongdoing State for assurances or guarantees of non-repetition, was an exceptional measure and should be deleted or at least redrafted by omitting guarantees and giving the wrongdoing State the right to determine the kind of assurances required by the given situation.

6. With respect to the scope of the dispute settlement regime, the Commission should design a system for dispute settlements to deal with any question relating to the interpretation or application of the draft articles on State responsibility. The envisaged system should safeguard the interests of weak States and should be fair and equitable.

7. With regard to the law of the non-navigational uses of international watercourses, his delegation considered that a framework convention was preferable to model rules and that dispute settlement clauses should be included in the draft articles. In the light of the growing needs of populations and the constantly diminishing water supply, disputes over the use of international watercourses were likely to proliferate. The international community should therefore establish a mechanism capable of settling such disputes at the technical level. His Government would subsequently present detailed comments on the draft articles in order to facilitate the Commission's work. Meanwhile, his delegation proposed that the current wording of articles 1 (2), 2 (a) and 2 (b), which might create confusion, should be redrafted. Article 2 (a) should preferably reflect the "physical natural relationship" between the parts of a watercourse that were situated in different countries. That would help to determine the regime applicable to seasonal or artificially connected water courses.

8. In article 2 (b), the expression "flowing into a common terminus" should be retained. The question of confined international groundwaters required a different set of rules.

9. In article 3 (1), reference should be made to one or more bilateral or multilateral agreements rather than only to "one or more agreements". In article 3 (2), the word "appreciable" should be replaced by "significant". Moreover, it would be useful to specify that the future framework convention would not affect existing international watercourse agreements unless the States parties to such agreements decided otherwise. Perhaps, as the Special Rapporteur had suggested, it might be necessary to reword article 3 in order to deal with any lex posterior issues.

10. With respect to the principle of equitable and reasonable utilization referred to in articles 5 and 6, the list of factors to be taken into account should be expanded to include factors relating to the volume or length of a watercourse. It was equally important to make a provision for the already existing agreements.

11. Mrs. ŠKRK (Slovenia) said that, in general, her delegation was not opposed to the Part Three of the future convention on State responsibility, which would contain provisions for dispute settlement. That approach strengthened the obligation of States to settle their disputes by peaceful means. Her delegation therefore supported the realistic approach suggested by the Special Rapporteur

(Mrs. Škrk, Slovenia)

in article 12 (1) (a), which required the injured State to resort to peaceful means for the settlement of disputes, in accordance with Article 33 of the Charter, before resorting to countermeasures in order to remedy the illegal situation. That approach was already well-grounded in general international law and corresponded to the overall obligation of States to fulfil their international responsibilities in good faith and to cooperate with each other in order to meet them.

12. Her delegation supported, in principle, the three-step settlement system (conciliation, arbitration and judicial settlement) proposed by the Special Rapporteur, while regretting that the role of negotiations had been overlooked. The use of dispute settlement procedures should not limit the right of the injured State to eliminate the consequences of wrongful acts committed by the wrongdoing State. In that connection, the interim measures that could be taken, in the context of the conciliation procedure, against either the injured or the wrongdoing State appeared to be questionable. To grant to the wrongdoing State the right to demand that interim measures should be taken against the countermeasures of the injured State would be to violate the principle of ex injuria jus non oritur. Moreover, interim measures with binding effect deviated from the normal concept of conciliation, which was intended to convince, not to order.

13. With regard to arbitration and judicial settlement, the proceedings should be as brief as possible, in order to prevent the wrongdoing State from unduly prolonging the wrongful situation and evading countermeasures. For the same reason, the Conciliation Commission should have fewer members than the five proposed.

14. Turning to the question of international crimes and their consequences, she agreed with the Special Rapporteur that not all breaches of erga omnes obligations could be regarded as international crimes, and that the severity of the breach should be the determining factor in distinguishing between an international crime and an international delict. The legal consequences of an international crime touched upon the most fundamental questions of international law, including the legality of the use of force and the legitimacy of Security Council decisions. Accordingly, greater prudence was needed. The notion of an international crime, as defined in article 19 of Part One of the draft articles on State responsibility, should be reviewed by the Commission in the light of recent developments in the theory and practice of international law. The list of violations of international law in article 19 was not exhaustive, and the Commission should consider adding to it grave violations of the right to self-determination; it should also consider adding massive violations of human rights to the list of crimes against humanity.

15. With regard to State responsibility and the legal consequences thereof, her delegation supported the approach taken by the Commission in draft article 6 bis on reparation. The injured State should be entitled to restitution in kind by the wrongdoing State; however, situations in which third States could be affected by restitution in kind should be added to the list of exceptions to that rule.

(Mrs. Škrk, Slovenia)

16. With regard to compensation, her delegation believed that the wording of article 8 should be further clarified. That question was far too important to be left to the discretion of the States concerned or of a third party.

17. While supporting the Commission's decision to deal with the question of moral damage in a separate article, her delegation believed that it would be advisable to stipulate that the injured State was entitled to both compensation and satisfaction.

18. Lastly, her delegation noted with satisfaction that the Commission had included in its long-term programme of work the topic of "State succession and its impact on the nationality of natural and legal persons". When considering that topic, the Commission would need to take into account the right of successor States to adopt their own legislation on nationality, while ensuring that it did not impose on States stricter standards than those generally accepted.

19. Ms. LI Yanduan (China), noting that State responsibility was one of the most complex and difficult topics dealt with by the Commission, said that the draft articles adopted at the Commission's previous session chiefly concerned the content, forms and degree of State responsibility. In view of the importance of those articles, her delegation would study them very carefully and would confine itself, for the time being, to making a few comments on some of them.

20. With regard to reparation, there were two diverging views; some States held that the right to demand reparation should be limited to directly injured States, while others believed that all States injured by a wrongful act, whether directly or indirectly, should have that right. In her delegation's view, the right to reparation should be limited to directly injured States; otherwise, the responsibility of the wrongdoing State would be unreasonably extended, and the rule of proportionality would not be observed. Accordingly, efforts must be made to distinguish clearly between "direct" and "indirect" damage. While the purpose of reparation was undoubtedly to eliminate all the consequences of the wrongful act, she wondered whether it should be interpreted as the obligation to re-establish the situation which would probably have existed if that act had not been committed, or to restore the status quo ante. The Commission should consider that issue further, taking into account the views of Governments.

21. It should also be noted that reparation should not be punitive in any way, in conformity with the principle of the sovereign equality of States.

22. With regard to article 10 bis, her delegation proposed that footnote 261, referring to cases which had arisen at the end of the nineteenth century or the beginning of the twentieth century and which were therefore outdated, should be deleted.

23. With regard to article 8 on compensation, its wording disregarded the practice followed since the end of the Second World War, namely, the conclusion of bilateral agreements through diplomatic negotiations. The Commission should take that into account on second reading.

(Ms. Li Yanduan, China)

24. As to the draft articles on the peaceful settlement of disputes, her delegation believed that fundamental questions, such as the scope of the proposed system and its relationship to other areas of international law, remained to be studied. It was unclear whether the system should apply only to disputes which arose after the adoption of countermeasures, should also cover disputes which arose before the adoption of countermeasures, or should apply to all the articles on State responsibility. Her delegation believed that the question of dispute settlement should be dealt with separately. To include it in the draft articles on State responsibility would only complicate further that already difficult topic. Moreover, the proposed procedures ran counter to the principle of the freedom of States to choose their own means of peaceful settlement of disputes, including negotiations, as provided for in Article 33 of the Charter of the United Nations. Noting that the draft articles on conciliation provided for the adoption of mandatory interim measures, she said that that was a bold idea which would be difficult for States to accept.

25. Mr. FERRARI BRAVO (Italy), referring to international liability for injurious consequences arising out of acts not prohibited by international law, queried the wisdom of the Commission's decision to treat separately, under the topic of transboundary harm, activities involving risk and harmful activities: the obligation of prevention did not seem to differ perceptibly in the two situations, as prevention entailed not only avoiding damage but also minimizing its effects. Furthermore, the establishment of a single set of rules covering prevention would simplify the draft and facilitate the application of a regime of international liability.

26. The structure and content of the rules on prevention of transboundary harm appeared to be consistent with State practice and its most recent development, as reflected in the documents of the Rio Conference on Environment and Development. While his delegation agreed with the obligation of "due diligence" contained in the rules, it considered that the regime to be established should not necessarily exclude "liability without fault" on the part of the State in whose territory transboundary harm originated. Instead, an obligation of reparation could be imposed even when no violation of the rules on prevention had taken place. However, that obligation should be residuary in nature, and reparation would only be required of the State of origin of transboundary harm after unsuccessful recourse to the mechanisms for repairing damage in the context of private law liability.

27. His delegation noted with satisfaction the progress made in the work on the subject of State responsibility, which offered hope that the first reading of the draft articles might be completed by 1996.

28. Concerning in particular the peaceful settlement of disputes, his delegation agreed with the Special Rapporteur on the need to establish a mechanism for the peaceful settlement of disputes in the field of countermeasures. At a later date the possibility of extending the dispute settlement regime to cover all the rules contained in the draft articles should be considered.

(Mr. Ferrari Bravo, Italy)

29. His delegation also welcomed the fact that the Special Rapporteur had looked in a particularly thorough way at the questions raised by article 19 in Part One of the draft. It considered that a distinction should continue to be made between international crimes and delicts, because the consequences of wrongful acts were different in the two cases. In addition, with regard to international crimes, aggression must be separated from other crimes, even though the two types of wrongful conduct could take place simultaneously. Combating aggression was essentially the task of the Security Council. Combination of the Security Council's powers and the judicial assessment of the facts constituting aggression should be avoided, since such a regime would not be effective and, more important, might establish a "mutual subordination" between the Security Council and the judicial body, which might be the International Court of Justice.

30. Concerning the law of the non-navigational uses of international watercourses, his delegation hoped that the draft articles to be adopted would take the form of an instrument which would be binding on the States parties, and would provide them with the general principles and rules applicable in that field, in the absence of a specific agreement among the States concerned, and guidelines for the negotiation of future agreements. As for the peaceful settlement of disputes, it would be useful if the Commission would recommend a tailored set of provisions on fact-finding and dispute settlement, through conciliation procedures, especially if a legally binding instrument was chosen.

31. His delegation endorsed the Commission's suggestion of including two new topics in its agenda, namely "The law and practice relating to reservations to treaties" and "State succession and its impact on the nationality of natural and legal persons". For practical reasons the first of those subjects should be addressed before the other, since State practice on State succession was currently in a phase of rapid evolution.

32. Mr. VASSYLENKO (Ukraine), referring to State responsibility, said that draft articles 11 to 14 inclusive, which dealt with what the Special Rapporteur called "countermeasures" and what his delegation preferred to describe as "sanctions", should not be contained in Part Two of the draft articles, which concerned the content, forms and degrees of responsibility, but in Part Three which dealt with the implementation (mise en oeuvre) of international responsibility and dispute settlement procedures. That was because international sanctions were a compulsory means of dispute settlement intended to compel the wrongdoing State to fulfil obligations arising from its responsibility. His delegation also wished to make the legitimacy of "countermeasures" dependent on additional conditions which, for instance, would include time-limits for their application. Part Three of the draft articles should include, in addition to the "countermeasures" which each State could apply for its own reasons, provisions concerning sanctions applied by States collectively through international organizations. That would be in conformity with contemporary international practice and would follow the logic of draft article 19 which defined the concept of an "international crime".

33. His delegation was firmly convinced of the urgent need to complement Part Two of the draft articles by adding articles on the material and political responsibility of States for international crimes, a responsibility which should

(Mr. Vassylenko, Ukraine)

take the form of reparation and satisfaction of an extraordinary character. Part Two of the draft articles should also include provisions on the criteria for assessing the damage inflicted upon an injured State by an internationally illegal act and, on that basis, criteria for assessing the extent of the responsibility of the wrongdoing State.

34. His delegation agreed in principle with the idea of a multi-step dispute settlement regime including compulsory recourse to the International Court of Justice when conciliation and arbitration had failed. Such a system must necessarily complement "countermeasures", whose sole objective was to facilitate the settlement of disputes.

35. The establishment of an effective system for the implementation of State responsibility had come up against substantial difficulties, both conceptual and practical, which nevertheless could and should be overcome if an effective mechanism guaranteeing international legal order was to be established. Furthermore, it should not be forgotten that the future convention on State responsibility must above all have a deterrent function and should therefore include provisions of a radical nature.

36. The draft statute for an international tribunal annexed to the Commission's report was a solid foundation on which to continue the work which would end in the formulation of a draft treaty. That work must be coordinated with the elaboration of the draft articles on State responsibility, because very often crimes against the peace and security of mankind committed by individuals were the consequence of an international crime committed by a State. In such cases, the responsibility of individuals seemed to be a particular aspect of the responsibility of the State which had committed the international crime.

37. His delegation noted with satisfaction that the Commission had continued its work on the subject of international liability for injurious consequences arising out of acts not prohibited by international law with a view to establishing a legal regime which would effectively ensure the protection of people and the environment from the negative consequences of transboundary harm.

38. His delegation had followed with interest the work of the Commission on the law of the non-navigational uses of international watercourses, which had important practical implications from the standpoint of the equitable non-navigational use of the resources of international watercourses and the maintenance of good-neighbourly relations between bordering States.

39. Mr. BERMAN (United Kingdom), referring to the Commission's long-term programme of work, said that in paragraph 440 of its report, the Commission sought the approval of the General Assembly to include two topics in its agenda. The General Assembly should give its approval, since both topics were precise and responded to needs of the international community. In each case, therefore, the Commission would be in a position to make a direct contribution, on a realistic timescale, to the formation and development of State practice.

(Mr. Berman, United Kingdom)

40. The first topic, entitled "State succession and its impact on the nationality of natural and legal persons", met the wishes of the States of Central and Eastern Europe and Central Asia, many of them newborn in the breakup of existing State structures in recent years. Many of those States had inherited old - or acquired new - minorities problems which, from their potential to threaten stability and peace, posed a challenge for the international community as a whole. While the problem did not derive wholly from nationality, with its attendant civil and political rights, an important part of it derived therefrom. Clarification of the nationality issue by the Commission could thus play a worthwhile role in the development of techniques and practices for dealing effectively with situations that affected directly the lives of millions of people. As the Commission pointed out, the topic was in a sense already part of its unfinished business, and was situated on the boundary between international obligations and national discretion. It was, however, quite some years since the Commission had identified the three topics of State succession in 1963, during which time there had been striking developments in international human rights law. The Commission could and should take those matters into account. Perhaps, in the first instance, it could prepare a report which, without being overly prescriptive, could pave the way for further work at the Sixth Committee's request.

41. A similar approach might be useful for the other topic, "The law and practice relating to reservations to treaties". The Commission quite rightly pointed out that there was no question of challenging the regime established by articles 19 to 23 and, one might add, article 2 of the Vienna Convention on the Law of Treaties. What was needed was clarification of the regime, particularly of its application to practical cases, which the Government of the United Kingdom would find extremely beneficial. No one had ever pretended that the subject of reservations, objections to reservations and their effects was an easy one. The authorities of the United Kingdom often shared the perplexity which they observed in the practice of other Governments. Not surprisingly, misunderstandings tended to be even greater among national legislatures when called upon to exercise their constitutional function of approving the ratification of treaties. The issue that confronted Governments was how to make the legal regime work in a way that preserved the sanctity and consensual basis of treaty obligations while allowing within that framework the degree of controlled flexibility desired by the International Court of Justice and in turn by the General Assembly and by the United Nations Conference on the Law of Treaties held at Vienna.

42. By and large, the questions listed by the Commission in paragraph 428 of the report seemed to be the right ones. The Commission should perhaps add an examination of the criteria by which the compatibility of a reservation with the object and purpose of a treaty was to be judged, and the legal effects of an "objection" by one contracting State to a reservation formulated by another State party which it found to be incompatible with the object and purpose of the treaty, since it was those questions that underlay many of the practical problems of implementation. His delegation experienced some unease over the Commission's use of the term "validity of reservations" in paragraph 428 of its report. While the context indicated what the Commission had in mind, the wording used could be interpreted as presupposing the possibility that a statement conditioning the consent of an adhering State to be bound by a treaty

(Mr. Berman, United Kingdom)

might by some means be held to be a nullity. In fact, article 2 (d) of the Vienna Convention, by referring to a reservation not only as a "unilateral" statement which "purported" to achieve an exclusion or modification of treaty terms, but even more so articles 19 et seq., in their careful references to "formulation" of reservations, made it plain that any such statement was ipso facto a "reservation", but that its legal effect remained to be determined by the rules which followed. That emerged with great clarity from the Commission's commentary on articles 17 to 19 of the 1962 draft and explained why, in the usage of the Vienna Convention, even the cases expressly prohibited, or those incompatible with the object and purpose of a treaty, were referred to in article 19 as "reservations", and why article 21 referred to a reservation "established" with regard to another party.

43. Thus, with those two new items and the other items already on its agenda, the Commission would have a full menu for the remainder of its current term of office. His delegation had taken note with pleasure of the Commission's willingness to experiment with new working methods in the interests of efficiency, and it hoped that that questing spirit would continue to animate the Commission's approach, and extend to exploring the wide variety of forms in which the Commission might embody its work and its report to the Sixth Committee. At all events, if the Commission was able to keep to its plans, the need would arise for further topics for its work programme from 1997 onwards. The Commission's success in its work with the proposed new items might provide pointers to the definition of items for inclusion in its agenda. The identification of such items was a joint undertaking of the Commission and Governments, which must play their part in that regard. He was sure that the Commission and the Legal Counsel would welcome suggestions which met the criteria resumed in paragraph 429 of the Commission's latest report.

44. On the subject of State responsibility, his delegation was in something of a quandary as to what sort of comment might be of real help to the Commission in the completion of its work. The Commission must be encouraged to round off the drafting work during the current quinquennium and to present a complete draft to Member States as soon as possible in order for the entire exercise to be brought to fruition by the end of the United Nations Decade of International Law.

45. Turning to the draft articles adopted in 1992 on the topics of cessation, reparation, restitution, compensation, satisfaction and non-repetition, he observed that the articles brought home how especially difficult it was to be overly prescriptive in that field. The international law of remedies was piecemeal and undeveloped, which was no doubt due to the current infrequency of recourse to arbitral or judicial settlement of disputes where the nature or extent of the remedy was itself a matter of dispute. Many of the authorities culled by the Special Rapporteur were somewhat old, and there was a legitimate question of how far the guidance they provided remained valid for the current times. It was evident that international tribunals had been heavily influenced by the particular circumstances of individual cases, which showed that circumstances were capable of an almost infinite variety. To attempt a prescriptive table of remedies confronted one with issues of definition - especially of the delimitation of the availability of one remedy against another - which it might not be necessary to confront in the current context. His delegation would have some sympathy for an approach based on a listing of

(Mr. Berman, United Kingdom)

the type of remedy which might be claimed by an injured State (or awarded by a tribunal), rather than seeking to state each of them in terms of an express entitlement of the injured State. That would still leave room for the inclusion of further language clarifying and defining the nature of particular remedies, which could draw on the material embodied in the current draft articles and their extremely full commentaries.

46. On the settlement of disputes, his delegation strongly inclined towards defining appropriate procedures for the settlement of disputes by third-party means as an integral part of the draft articles. The question was what procedures were appropriate. As to that, there could be little doubt that a general dispute settlement regime under a code on State responsibility would have far-reaching effects. Inasmuch as State responsibility formed one of the basic underpinnings of the whole system of international law, such provisions would turn the project into a general treaty on the peaceful settlement of disputes. To ask whether that would not go too far was neither cowardice nor pessimism. The Commission should be encouraged to look again at simple mechanisms, modelled perhaps on those in the Vienna Convention on the Law of Treaties, and linked to those parts of the draft where, by common consent, compulsory processes for the settlement of disputes were essential. That was not to say, however, that the drafting should place too much reliance on dispute settlement procedures as an ex post corrective to substantive provisions; as a number of delegations had stated the previous year, care should be taken to provide an equilibrium between ex post and ex ante limitations in areas such as countermeasures.

47. Thirdly, the Commission's attention to remedies had thrown a further spotlight on the category of "crimes" put forward in article 19 of Part One of the draft articles. That had perhaps proven to be the most controversial of all the Commission's ideas on the topic. It was useful to reflect on it because of the contrast posed with the very different concept of "crimes" that the Commission had just been considering in the context of an international criminal tribunal. His delegation was strongly of the view that the Commission should not, in further elaborating Parts Two and Three, simply assume the perpetuation of its concept of "State crimes", and still less seek to develop it. It should instead consider, in the light of all the consequences, including the extreme complexities the concept would introduce into the area of remedies, whether the concept should remain part of the draft articles at all. That point had been expressed with much eloquence by the representative of France at the previous meeting.

48. Lastly, the Commission should, when the time came for Governments to assess the draft articles as a whole, be aware that the commentaries would play a major role. His Government would be grateful for any effort by the Commission to review the commentaries as a whole, with a view to focusing them more on the effect of each individual article than on historical antecedents.

49. Mr. CALERO RODRIGUES (Brazil) said that State responsibility was at the very centre of international law, affecting the application of all its rules. The Commission, having as of 1980 completed Part One of its articles on the topic, concerning the origin of international responsibility, had ever since

(Mr. Calero Rodrigues, Brazil)

been considering Part Two, concerning the content, forms and degrees of responsibility. Up to its forty-fifth session, the Commission had adopted only five articles: six new articles had then been adopted, as well as a new paragraph to article 1. The new articles dealt with the substantive legal consequences of those internationally wrongful acts classified as "delicts". The Commission had also considered, and should adopt at its next session, four articles on the instrumental consequences of internationally wrongful acts. It had also begun to study the question of the settlement of disputes and had an exchange of views on a very preliminary report on the legal consequences of "crimes". It could be reasonably expected that the Commission would be able to conclude consideration of the topic by the end of the mandate of its current membership, as planned. In theory, the best contribution the Sixth Committee could make would be to express its views on the settlement of disputes and on the consequences of international crimes. However, his delegation preferred to abstain from doing so.

50. As regarded the settlement of disputes, the question was so closely linked to the provisions that would deal with the instrumental consequences (countermeasures) that at that point his delegation could only say that it favoured the inclusion in the draft of dispute settlement provisions incorporating recourse to binding third-party settlement procedures.

51. On the question of international crimes, in the sense of article 19 of Part One of the draft - and the topic might involve reconsideration of article 19 itself - his delegation felt that the Committee should wait for the submission by the Commission of further material for comment. It would therefore confine its comments to the articles on the substantive consequences of internationally wrongful acts, adopted by the Commission at its forty-fifth session. Those articles did not raise issues as complex as those that would arise when dealing with the instrumental consequences or countermeasures. They were relatively simple, and the Commission, looking carefully at doctrine and practice, had been able to achieve generally satisfactory results.

52. The Commission established an initial distinction between the obligations of reparation, in articles 7 to 10, which were put in motion by the injured State, which was entitled to do so, and obligations of a more general nature, which it would not be heretical to consider as having their source not in the secondary rules of State responsibility but in the primary rules disturbed by the internationally wrongful act. One of them, the continued obligation to comply with the violated obligation, set out as a saving clause in a new paragraph 2 to article 1, seemed self-evident. The second, the obligation to ensure cessation of the violation when the wrongful act had a continuing character, might also be considered an independent obligation that had to exist for the author State, independently of the attitude of the injured State. A continuation of a wrongful act harmed not only the State towards which the obligation existed but the legal order as a whole.

53. The obligations of reparation, on the other hand, existed for the benefit of the injured State, and it was therefore normal that they should be made dependent on the initiative of that State, to which an entitlement to action was recognized.

(Mr. Calero Rodrigues, Brazil)

54. Article 6 bis referred to reparation as a general concept, covering all the actions or measures that should be taken to wipe out, as far as possible, all the consequences of the internationally wrongful act. Articles 7, 8 and 10 specified the forms of reparation: restitution in kind, compensation and satisfaction. Article 6 bis also referred to "guarantees of non-repetition" as a form of reparation. His delegation would prefer to consider such guarantees as an independent and separate entitlement of the injured State. He found it difficult to see them as part of the "wiping out" of the consequences of a wrongful act. Those consequences were in the past and in the present, whereas the guarantees placed themselves in the future. That point, however, was purely conceptual, and did not prevent Brazil from accepting article 10 bis, in which, incidentally, the words "where appropriate" were essential.

55. Restitution in kind was a more logical form of reparation, but it was not without problems. He wondered whether it should be understood as an obligation to re-establish the situation that had existed before the wrongful act had been committed, or the situation that would exist if the wrongful act had not been committed. The second interpretation was more appealing, but in most cases it would be very difficult, if not impossible, to determine how, if the wrongful act had not occurred, the situation would have evolved and what it would be at the time of reparation. The Commission had thus accepted the view that restitution should aim at re-establishing the situation that had existed when the wrongful act had been committed, and that any damage not covered should be repaired by compensation. His delegation agreed with that approach, which took into account the practical difficulties of the alternative.

56. The Commission established four cases in which restitution could not be required. Two of them did not raise any difficulties; restitution would not be required if it was materially impossible, or if it would involve a breach of an obligation arising from a peremptory norm of general international law. Indeed, no one could be expected to do the impossible, and jus cogens should not be contravened. Yet it was doubtful whether a situation could arise in which restitution would involve the breach of a peremptory norm of international law, unless the performance of the original obligation would also have entailed such a breach, restitution being, after all, a belated performance of that obligation. The same observation could be applied to another exception to restitution, namely, that it should be excluded if it would seriously jeopardize the political independence or economic stability of the State which had committed the wrongful act. In that case, too, the same reason could have been invoked with regard to the original obligation. Moreover, in some cases, the problem would not be eliminated - especially where it involved a threat to the economic stability of a State - if restitution in kind was converted into compensation. A final exception, provided for in article 7 (c), was presented by the Commission as being based on a number of arbitral decisions. However that might be, that exception appeared to be unfairly favourable to the State having committed the wrongful act. He wondered whether it was reasonable in such a case to place the States involved on an equal footing.

57. Compensation was well defined by the Commission as the remedy to be employed to cover "economically assessable damage", including interest and, where appropriate, loss of profits. His delegation noted with satisfaction that the Commission had not mentioned "pecuniary compensation", although paragraph 16

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of the commentary to the article referred to compensation as consisting "in the payment of a sum of money". If money was to be the measure of damage, as had been recognized since Grotius, that did not mean that compensation must take the form of money; money could be replaced by goods, or even services of corresponding value, if that would serve the interests of the States concerned.

58. Article 8 provided succinctly that compensation was due for the damage caused by the wrongful act. The idea, of course, was that a causal link must exist between the act and the damage. The Commission admitted, in a way, that the provision was too concise when it recognized that the question called for more extensive comments and provided them in paragraphs 6 to 13 of the commentary. His delegation wondered whether it would not be useful to include in the text of the article itself some of the more important points now contained in the commentary.

59. The third form of reparation, satisfaction, was addressed by the Commission in article 10. Traditionally, while restitution in kind covered injury in general (sometimes referred to as legal injury) and compensation covered "material injury" ("damage" or, in the Commission's words, "economically assessable damage"), satisfaction covered moral injury or damage. Traditionally, too, moral damage or injury meant an offence to the honour, dignity or prestige of a State. It could be said, and it had been said, that those words did not make the concept much clearer. The Commission had not used them in article 10 and, in fact, had considerably enlarged the scope of satisfaction. It established that the injured State was entitled to obtain satisfaction "if and to the extent necessary to provide full reparation", in particular, reparation for moral damage. Thus, moral damage was no longer the exclusive element justifying apologies, nominal damages, disciplinary action against or punishment of agents of the State and even "damages reflecting the gravity of the infringement". His delegation was uncertain whether such a departure from the traditional concept of satisfaction was useful. It might give rise to a very large spectrum of claims concerning damages which up to then would have been repaired through restitution or compensation.

60. On the other hand, paragraph 3 of the article was particularly welcome, in that it prohibited the injured State from making demands which "would impair the dignity of the State which ha[d] committed the internationally wrongful act".

61. Having devoted most of its time at the forty-fifth session to the topics of an international criminal court and State responsibility, the Commission had been unable to give full attention to the two other topics on its agenda, namely, international liability for injurious consequences arising out of acts not prohibited by international law, and the law of the non-navigational uses of international watercourses. Those topics had not been forgotten, but the progress achieved had been meagre, as might have been expected under the circumstances. His delegation continued to believe that the Commission should not view itself as obliged to consider every topic at every session. It would be better for the Commission, and for the Sixth Committee, if its efforts were concentrated on topics to which adequate time and attention could be devoted so that tangible results could be achieved. Clearly, the Sixth Committee would not have considered the Commission to be lazy or remiss in its duties if its current report had dealt only with the draft statute of an international criminal court

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and with State responsibility. What was offered for the Committee's consideration with regard to international liability and watercourses was not very substantial, and it would have been preferable to examine it in the context of a more fully developed draft.

62. Few topics on the Commission's agenda were so innovative, so important or of such immediate interest as the topic of international liability. The Commission had included it in its programme of work in 1978, yet discussion was still continuing with regard to the relationship between that topic and State responsibility - as reflected in paragraph 113 of document A/48/10 - and with regard to article 1, on the scope of the articles. A very provisional article on scope had recently been approved by the Drafting Committee, but not yet by the Commission (A/48/10, para. 103).

63. In 1992, as part of a decision on how to proceed with the work, a decision to which his delegation had expressed strong reservations, the Commission had requested the Special Rapporteur to examine further the issues of prevention and propose a revised set of draft articles. It had noted that the Special Rapporteur had already examined issues of prevention but he had looked at both activities having a risk of causing transboundary harm - activities involving risk - and activities causing transboundary harm - activities with harmful effects. He had been requested to examine the issues of prevention only in respect of activities having a risk of causing transboundary harm.

64. With extreme patience the Special Rapporteur had reformulated the draft articles on prevention, trying to delete all references to harm. Naturally, he had been only partially successful, since an activity involving risk might at any given moment actually cause harm. Thus, in article 14, the Special Rapporteur had indicated the measures that a State should oblige its operators to take "to minimize the risk of significant transboundary harm and reduce its probable scale or, in the event of an accident, to contain and minimize such harm". He had added that the State must encourage "the use of compulsory insurance or other financial guarantees enabling provision to be made for compensation". That of course meant compensation for harm and not for risk.

65. His delegation considered that the Special Rapporteur had been asked the impossible, namely to divide and isolate what could not be divided or isolated. The scheme he had proposed in the draft articles could probably be used, with certain adjustments, as a basis for a reasonable set of articles on prevention, covering all the activities within the scope of the draft articles. As things stood, his delegation was not in a position to go further in the analysis of the proposed texts, nor to make more extensive comments on the topic.

66. With regard to the law of the non-navigational uses of international watercourses, the new Special Rapporteur for the topic had started his work with the presentation of a report that was modest in that it covered only 10 of the 32 articles to be considered, but which demonstrated that he had a full grasp of the subject and a good understanding of the way in which the second reading of the draft articles should be conducted. His opinion that only "fine-tuning" was needed had the complete support of the Brazilian delegation.

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67. The main point on which his delegation disagreed with the Special Rapporteur was his suggestion that would entail changing the relationships between articles 5 and 7, between equitable and reasonable utilization and the obligation not to cause appreciable (significant) harm.

68. The text adopted by the Commission on first reading stipulated that States should in their respective territories utilize an international watercourse in an equitable and reasonable manner (art. 5), but that they were under an obligation not to cause appreciable (significant) harm to other watercourse States (art. 7). The Special Rapporteur wished to make equitable utilization the determining criterion. When using an international watercourse in an equitable and reasonable manner, States would be exempt from the obligation not to cause significant harm to other watercourse States, except in cases of pollution. Equitable and reasonable utilization was an appealing concept in hydrology and in water resource management but his delegation had always doubted whether it was precise enough for legal purposes and found it difficult to imagine that a State would have to suffer harm because a watercourse of which it was riparian was being used in the territory of another State in a manner which that other State considered to be "equitable and reasonable". The obligation not to cause appreciable harm, contained in article 7, would become, according to the Special Rapporteur's suggestion, simply an obligation to exercise due diligence. His delegation was confident that the Special Rapporteur and the Commission would be wise enough not to touch articles 5 and 7.

69. Three issues had been raised during the Commission's debate which called for brief comment. The first concerned the form the draft articles should take, either a framework agreement or model rules. His delegation was somewhat surprised that the issue still needed discussion and that the Special Rapporteur had felt he had to suggest a preliminary exchange of views on the question, since exchanges of views had taken place on several occasions and the Commission had begun drafting the articles on the basis that a framework convention was being prepared, an approach that had caused no objections either in the Commission or the General Assembly, or in the comments of Governments. There seemed to be no utility in reopening the debate on that point.

70. The second issue was whether provisions on dispute settlement should be included in the instrument being prepared. The report of the Commission showed that most of its members favoured that inclusion, as did his delegation.

71. The third issue was the question of confined groundwaters, i.e. groundwaters unrelated to surface water. The Special Rapporteur was to undertake a study in order to determine the feasibility of incorporating confined groundwaters into the scope of the draft articles. Along with several members of the Commission, his delegation did not see how such waters could possibly be considered to be part of a watercourse, which was defined as "a system of surface and underground waters constituting by virtue of their physical relationship a unitary whole". International confined groundwaters might very well be in need of regulation and the Commission might consider

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looking into the subject, but the application of the articles under consideration to such waters was unthinkable, as was the grafting of specific provisions on confined groundwaters onto those articles. His delegation considered that the task to be undertaken by the Special Rapporteur was a hopeless one.

72. Mr. NJENGA (Secretary-General of the Asian-African Legal Consultative Committee (AALCC)) recalled the activities which the AALCC secretariat had carried out in implementing the programme of work of AALCC and the initiatives taken with a view, particularly, to strengthening cooperation between that body and the United Nations, and said that AALCC, which had originally been set up to formulate legal principles and provide advisory services to its member States, had set itself the task of supporting and complementing the work of the United Nations in several areas, particularly the progressive development and codification of international law.

73. For that reason, AALCC had associated itself in recent years with the realization of projects and studies concerning the United Nations Decade of International Law, the international protection of refugees, international economic cooperation for development, the transboundary movement of hazardous wastes and their disposal, the United Nations Conference on Environment and Development, the World Conference on Human Rights and the report of the Secretary-General entitled "An Agenda for Peace". In that respect, without being involved in preventive diplomacy, peace-keeping, peacemaking or peace-building, AALCC had undertaken to encourage States to make better use of the International Court of Justice to settle disputes by peaceful means.

74. The items on the agenda of the Commission - the draft Code of Crimes against the Peace and Security of Mankind, international liability for injurious consequences arising out of acts not prohibited by international law, the law of the non-navigational uses of international watercourses and State responsibility - were of particular interest to the States of Asia and Africa.

75. The law of the non-navigational uses of international watercourses had long been on the agenda of AALCC which, at its thirty-second session, had requested its secretariat to examine other crucial areas relating to river system agreements, with special emphasis on the utilization of freshwater resources, and had expressed the hope that the Commission would complete rapidly its second reading of the draft articles on watercourses so as to facilitate the completion of a framework convention on that topic.

76. Following the General Assembly's proclamation of the United Nations Decade of International Law, the AALCC secretariat had submitted to the United Nations Legal Counsel an in-depth study on the Decade setting forth the proposals and views of AALCC on that matter; it had recently forwarded to the Legal Counsel a summary of AALCC activities in the context of the four objectives defined for the second phase of the Decade (1993-1994). The issue of the Decade would remain on the agenda of AALCC which hoped to make its modest contribution to the realization of those objectives.

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77. In that same context, AALCC was working actively with the Government of Qatar to organize at Doha, Qatar, from 22 to 25 March 1994 a conference which would consider, inter alia, environmental protection, the United Nations Decade of International Law, the peaceful settlement of disputes, the law of the sea, the new international economic order and humanitarian law. That conference, whose inaugural meeting would be attended by the Secretary-General of the United Nations, would bring together members of the International Court of Justice, several members of the International Law Commission, distinguished experts in international law, eminent academicians, the United Nations Legal Counsel and several high-level officials of the Organization. Members of the Sixth Committee had also been invited to attend.

78. With regard to the law of the sea AALCC had, at its thirty-second session, urged its member States which had not already done so to ratify the United Nations Convention on the Law of the Sea and had called on its member States to begin considering the idea of adopting a common strategy for the period between the deposition of the sixtieth instrument of ratification of the Convention and the first years of the entry into force of the regime instituted by it. In that connection, he hoped that the informal consultations to be held on certain pending issues would result in conclusions that satisfied those States which continued to have doubts about part XI of the Convention, without calling its very foundation into question.

79. The AALCC secretariat had not neglected the field of environmental protection; it had participated actively in the preparations for and the work of the United Nations Conference on Environment and Development and of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change and in the elaboration of the Convention on Biological Diversity. In addition, since the conclusion of the Rio Conference, it had been monitoring the implementation of Agenda 21 and the two conventions just mentioned. It was also monitoring the progress of negotiations concerning the International Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa. In that connection, it had prepared a comprehensive report on the most recent meeting of the intergovernmental negotiating committee set up to elaborate an international convention in that area and had formulated concrete suggestions on that matter.

80. At its thirty-second session, AALCC had adopted the Kampala Declaration on Human Rights, which had subsequently been presented to the Preparatory Committee for the World Conference on Human Rights (A/CONF.157/TC/62/Add.9). AALCC had been represented at that Conference, held at Vienna in June 1993.

81. AALCC had also been following with interest the development of international humanitarian law relating to the status and treatment of refugees and it had been cooperating actively in that area with the United Nations High Commissioner for Refugees and the Organization of African Unity. It was studying the concept of "safety zones" for persons displaced by conflict within their own country. It believed that the establishment of such zones by the Security Council should be subject to the consent of the State concerned and other parties to the conflict and should not violate the territorial integrity of the State in whose territory the zone was to be established.

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82. The AALCC secretariat was planning to elaborate model legislation on international humanitarian law relating to refugees which could then serve as a guideline for AALCC member States wishing to adopt legislation to give effect to the provisions of international and regional instruments on the status and treatment of refugees. In that connection, AALCC believed that the definition of the term "refugee" should be enlarged to reflect recent developments and enable the international community to meet the new challenges linked with that phenomenon.

83. In terms of economic issues AALCC had continued, through its Subcommittee on International Trade Law, to contribute, from the Afro-Asian perspective, to the drafting of nearly all of the legal instruments elaborated by UNCITRAL and UNCTAD.

84. In view of the trend towards privatization, deregulation and reform in the developing countries, in particular in Africa and Asia, the AALCC secretariat had been mandated to undertake a thorough study of the legal issues involved in privatization with a view to preparing a guide for Asian and African States. Within that framework, the secretariat was planning to arrange, in conjunction with AALCC's next session, to be held at Tokyo, a special meeting for the purpose of developing legal and institutional guidelines for privatization and elaborating a post-privatization regulatory framework. In that connection, he wished to thank the World Bank for having provided the AALCC secretariat with the services of two privatization experts and hoped that he could count on the assistance of other competent organizations such as the United States Agency for International Development and the International Development Law Institute.

85. AALCC was continuing to prepare briefs and studies on such diverse subjects as the deportation of Palestinians in violation of international law, in particular the Geneva Conventions of 1949; criteria to distinguish international terrorism from national liberation struggles; the extradition of fugitive offenders; the debt burden of the developing countries; the Indian Ocean as a zone of peace; and the legal framework for industrial joint ventures.

The meeting rose at 5.40 p.m.